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No. 83-689

In The
Supreme Court of the United States
October Term, 1983

STATE OF SOUTH DAKOTA, ET AL.,
Petitioners,
vs.
LOWER BRULE SIOUX TRIBE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RUSSEL L. BARSH
SIDNEY C. FLORES
FLORES, ESTREMERA & BARKIOS
95 South Market Street, Suite 250
San Jose, California 95113
(408) 292-3400
Counsel for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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RESPONDENT'S BRIEF IN OPPOSITION

PROCEEDINGS BELOW

Petitioners ask this Court to reverse the decision of the Eighth Circuit in *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F. 2d 809 (8th Cir. 1983), reversing the District Court for the Western District of South Dakota, 540 F. Supp. 292 (D. S. D. 1982). For the reasons that follow, Respondent believes the Eighth Circuit's inter-

pretation of relevant legislative history and Congressional intent was reasonable and supported by the evidence, and therefore not a matter for the discretionary supervision of this Court.

STATEMENT OF THE CASE

The Lower Brule Sioux Reservation is part of that territory reserved by the Sioux people for their "absolute and undisturbed use and occupation" by Article 2 of the Treaty of April 29, 1868 (15 Stat. 635). The Act of March 2, 1889 (25 Stat. 888) fixed the eastern boundary of the Lower Brule Sioux Reservation as "the center of the main channel of the Missouri River." Under the rule of *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970), this express reference to the midchannel vested both the riverbed and the adjacent fast lands in the Lower Brule Sioux Tribe. (Compare *Montana v. United States,* 450 U. S. 544 [1981], in which riverbed enclosed by the reservation, but not mentioned specifically in the applicable treaty, was held to have vested in the state.)

Under the Flood Control Act of 1944 (58 Stat. 887), the Army Corps of Engineers planned a system of four dams and reservoirs on the Missouri River, two of them on the Lower Brule Sioux Reservation. The Act of July 6, 1954 (68 Stat. 452) authorized the Corps to negotiate with the Tribe for the purchase of land for Fort Randall Dam, but when talks broke down over terms and price,

the Corps took 7,997 acres by eminent domain.* This displaced 19 families and inundated "a large portion of the timber and woodland" of the Reservation. Senate Report 2369, 85th Congress 2nd Session (1958), at 2.** Noting the extreme hardship to the Tribe occasioned by the condemnation, Congress specially appropriated additional compensation for the taking, separately computing the value of the fast land, the riverbed, and lost subsistence. Act of September 2, 1958 (72 Stat. 1773); Senate Report 2369, *supra*, at 3-4. "Their finest grass, crop, and timber lands on the reservation have been lost. These bottom lands . . . provided habitat for game and were the prime source of the natural products on which the Indians depended in good part for subsistence." Senate Report 2369, *supra*, at 3.

An additional 14,299 acres were taken by the Act of October 3, 1962 (76 Stat. 698) for the Big Bend Dam, displacing 62 families or more than half the population of the Tribe, and inundating the town of Lower Brule. "The Lower Brule Tribe has twice been called upon to give up its best bottom land for dam purposes," Congress noted. Senate Report 1636, 87th Congress 2nd Session (1962), at 5.*** "[D]eprived of an important source of their livelihood," tribal members' incomes had fallen to 15 per cent

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*The authority of the Corps to condemn Indian land under the Flood Control Act without additional Congressional direction was rejected in *United States v. Winnebago Tribe of Nebraska*, 542 F. 2d 1002 (8th Cir. 1976).

**House Report 2054, 85th Congress 2nd Session (1958), is identical in text and paging.

***House Report 852, 87th Congress 1st Session (1961), is nearly identical to Senate Report 1636.

of the national average, justifying a "generous rehabilitation program." *Ibid.* 7-8. The purpose of the 1962 Act's numerous conditions and appropriations was "to provide for the improvement of the social and economic conditions of the members of the Lower Brule Sioux Tribe." *Ibid.* 3.

From the start, Congress was concerned that steps be taken "to re-establish and protect" the Tribe's "economic, social, religious, and community life." Act of July 6, 1954 (68 Stat. 452, 1954). Both the Fort Randall and Big Bend takings were subject to a number of reservations in favor of Lower Brule economic survival. Both the 1958 and 1962 acts "revested" all minerals in the Tribe, including minerals beneath the bed of the Missouri River, and secured Tribal members' right to continue to graze, hunt and fish along the shores of the reservoirs. The ambiguous language Congress chose to qualify the residual Tribal hunting and fishing right, *viz.*, "subject . . . to regulations governing the corresponding use by other citizens of the United States," has left its scope and exercise open to dispute, however. Act of September 2, 1958, sec 5; Act of October 3, 1962, sec. 10.

Over the past decade both the Tribe and the State of South Dakota have asserted jurisdiction over wildlife management in the Fort Randall and Big Bend reservoir areas. They have disagreed over the location of wildlife refuges, seasons, and the means of taking waterfowl and fish. Complaint, paras. 7-11; Answer, paras. 3, 5-7; Affidavits of Duane Goodface and Michael Jandreau (Appendix). The Tribe's share of the wildlife production of the reservoirs obviously depends on the extent to which it can exclude non-members and State regulation. This is purely a distributive question. There has been no al-

legation that Tribal management is detrimental to wildlife in the reservoir areas, or that it affects neighboring parts of South Dakota. The State is asserting an economic, not conservational interest against the Tribe's subsistence rights.

Prior to the 1958 and 1962 takings, the reservoir areas were chiefly individual Indian and tribal trust lands. Based on the Tribe's historical and continuing dependence on wildlife, it would have been entitled to assert exclusive jurisdiction over hunting and fishing by members and nonmembers alike. *New Mexico v. Mescalero Apache Tribe*, 103 S. Ct. 2378, 2384, 2388 (1983), distinguishing *Montana, supra*. This power of self-government, which amounted to a practical collective ownership of wildlife, could be limited or extinguished only by Congress. *Washington v. Fishing Vessel Association*, 443 U. S. 658 (1979); *Menominee Tribe v. United States*, 391 U. S. 404 (1968); *United States v. Santa Fe Pacific Railroad*, 314 U. S. 339 (1941). The issue here, then, is whether either the 1958 or 1962 takings affected the political jurisdiction of the Tribe beyond what was necessary for the construction and operation of the dams themselves.

A number of familiar canons of statutory construction form the basis for evaluating the 1958 and 1962 acts. "Absent explicit statutory language," this Court has maintained, "we have been extremely reluctant to find congressional abrogation of treaty rights." *Fishing Vessel Association, supra*, at 690. Congressional intent to restrict or extinguish the tribe's territorial jurisdiction "must be expressed on the face of the Act or be clear from surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U. S. 481, 505 (1973); *Rosebud Sioux Tribe*

v. Kneip, 521 F. 2d 87 (8th Cir. 1975), *affirmed*, 430 U. S. 584, 587 (1977); *DeCoteau v. District County Court*, 420 U. S. 425, 444-45 (1975); *Menominee Tribe, supra*, at 413. Ambiguities are generally to be resolved in the tribe's favor. *DeCoteau, supra*, at 444; *Bryan v. Itasca County*, 426 U. S. 373, 392 (1976). If an enactment is susceptible of two interpretations, it should be construed to preserve tribal rights intact. *United States ex rel. Condon v. Erickson*, 478 F. 2d 684, 687 (8th Cir. 1973). We must therefore look, first, to the face of the relevant acts. If that fails, Congressional intent may be clear from legislative history. If no clear intent can be found, it must be presumed that Congress intended to leave tribal jurisdiction undisturbed.

ARGUMENT

1. Neither Act of Congress expressly altered reservation boundaries, limited the Tribe's wildlife-management authority, or delegated jurisdiction to the State.

There is a distinction between title and jurisdiction. *United States ex rel. Condon v. Erickson, supra*, at 688. The acquisition of title by the United States for a public purpose does not ordinarily divest State jurisdiction over the situs, or remove the situs from the State's territory. Nor is Respondent aware of any decision that federal acquisition of land within an Indian reservation, as for administrative or school facilities, divests the tribe of its territorial authority. Thus while the United States expressly acquired *title* to the sites required for dam construction and inundation within the Lower Brule Sioux Reservation, we must look separately for mention of jurisdiction in the applicable legislation.

Petitioner relies largely on sec. 5 of the Act of September 2, 1958, which authorizes the purchase of substitute lands for displaced Indian families inside or outside of the Lower Brule Sioux Reservation "as diminished." Petition, p. 21. No similar language can be found in the Act of October 3, 1962. Nor is it plain what this phrase contemplates. Presumably its intent was to prevent the resettlement of lands taken for the Fort Randall Dam. It makes no reference to jurisdiction. Tribal land ownership was unquestionably "diminished" by the act, but this does not necessarily prove intent to "diminish" the Tribe's territorial authority. Identical language was rejected in *United States ex rel. Condon v. Erickson, supra,* as too vague to work an extinction of tribal jurisdiction.

Besides, the House and Senate Committees used language in their reports suggesting they believed the dams and reservoirs remained inside the Reservation's borders. "The reservation has an area of 233,916 acres of which 7,997 are within the taking area of the Fort Randall Dam and Reservoir project." Senate Report 2369, *supra,* at 2. Why did Congress continue to include the project in the Reservation's total area *after* the land had been taken by eminent domain? And again, saying that Big Bend Dam "rests on the Lower Brule Reservation on one side." Senate Report 1636, *supra,* at 3. At best Congress was inconsistent, sometimes referring to a "diminished" Reservation and at other times describing the dams as "within" the Reservation. This scarcely qualifies as "clear intent" to remove more than 30 square miles of valuable riparian lands and wildlife areas from tribal jurisdiction and control.

Petitioner also relies on several statutory references to hunting and fishing regulations. The Flood Control

Act of 1944, sec. 4, provides that the use of any park or recreational facility within a project must be consistent with the hunting and fishing regulations "of the state in which such area is situated." But this begs the question, which is whether the Fort Randall and Big Bend project areas, once appropriated for dam purposes by the United States, ceased to be part of the Lower Brule Sioux Reservation and became instead part of South Dakota. Furthermore, the Flood Control Act cannot, by itself, implicitly abrogate Indian rights. *United States v. Winnebago Tribe of Nebraska,* 542 F. 2d 1002 (8th Cir. 1976) (holding that the Act was not sufficiently explicit to authorize the condemnation of Indian lands).

Both takings explicitly preserved the Tribe's right of access to the reservoir areas for hunting and fishing, "subject . . . to regulations governing the corresponding use by other citizens of the United States." Act of September 2, 1958, sec. 5; Act of October 3, 1962, sec. 10. Petitioner argues that this condition amounts to a delegation of regulatory authority to the State, but it is susceptible of at least two alternative constructions. It may be construed to require non-discrimination in tribal regulation of wildlife use in these areas, or to subject both tribal members and non-members to federal regulation. On its face, it makes no choice of law or of jurisdiction. Indeed, if interpreted as Petitioner suggests, this provision becomes inconsistent and meaningless. What was the purpose of expressly preserving an Indian right to hunt and fish subject to State law? The State could not have prevented Indians from hunting and fishing under State law, without violating the Fourteenth Amendment. *See, e.g., Little Thunder v. South Dakota,* 518 F. 2d 1253 (8th Cir. 1975);

Goodluck v. Apache County, 417 F. Supp. 13 (D.Ariz. 1975) (three-judge court), *affirmed* 429 U. S. 876 (1976). The statutory provision is surplusage unless it either secures the Tribe a *priority* under State or federal laws, or *jurisdiction* to enforce its own laws.*

Petitioner finally contends that *Montana, supra,* should be applied here because the land in question is no longer tribally-owned. Petition, pp. 27, 33. But there are two material distinctions between *Montana* and this case. *Montana* involved privately-owned fee-patent lands acquired under a policy of opening the reservation to settlement and ultimate absorption by the surrounding State. Here we are dealing with tribal lands acquired by the Tribe's "trustee," the United States, for flood control under legislation expressing frank solicitude for the Tribe's economic survival—and explicitly entrenching its hunting and fishing rights in the acquired area. Furthermore, *Montana* did not involve a tribe that depended historically, or continues to depend on riparian wildlife. In *Montana*, 450 U. S. at 566, this Court was careful to note that tribal jurisdiction will extend *even to activities on fee-patent lands* "when that conduct threatens or has some effect on the political integrity, the economic security, or the health and welfare of the tribe." Such is the case here.

Treaties and legislation have generally not been construed to divest tribal jurisdiction unless they include

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*The fact that some rights, *e.g.*, minerals and grazing, were explicitly preserved by legislation does not mean that others were lost by implication. In *Kimball v. Callahan*, 493 F. 2d 564, 566 (9th Cir. 1974), *cert. denied* 419 U. S. 1019 (1974), fishing rights were saved although the applicable legislation only expressly reserved hunting.

words of cession. *E.g., Rosebud Sioux Tribe, supra,* 430 U.S. at 597 ("cede, surrender"); *DeCoteau, supra,* 420 U.S. at 456 ("cede, sell, relinquish"); *United States ex rel. Cook v. Parkinson,* 525 F. 2d 120, 122 (8th Cir. 1975), *cert. denied* 430 U. S. 982 (1977) ("cede"). "Cession" is a familiar term of art implying a transfer of sovereignty, rather than a mere conveyance of economic rights. Here, no such language was used. On the contrary, Congress spoke in terms of minimal interference with the Tribe. Payment under the 1958 legislation was described as in "settlement of all claims *arising out of the construction,*" Senate Report 2369, *supra,* at 1 (emphasis supplied), and the 1962 acquisition was characterized as limited to what was necessary "to insure complete [federal] control *of the project,*" Senate Report 1636, *supra,* at 7 (emphasis supplied). Congress could have been explicit in taking a surrender and cession of the Tribe's entire political interest. Instead, it apparently chose to restrict its intrusion to what was necessary *for the project,* and no more. This neither explicitly includes, nor requires, federal or State ownership or control of wildlife.*

2. There is no evidence in the legislative record of Congressional intent to restrict or extinguish the Tribe's dependence on wildlife for subsistence; on the contrary, Congress clearly intended to strengthen the Tribe's economy.

Previous "reservation disestablishment" cases have involved various "surplus land acts" adopted in the wake

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*Petitioner makes much of the fact that the Tribe was given lump-sum payments for its lands in 1958 and 1962. But method of payment does not in itself shed light on Congressional intent. *United States ex rel. Cook, supra,* 525 F. 2d at 123-4.

of 19th-century Indian allotment. The history of this policy is an important guide to Congressional intent. The allotment program subdivided tribal lands and distributed the parcels to individual household. Title was to be held for the Indian owners in trust for twenty-five years, after which they would become "subject to the laws, both civil and criminal, of the State or Territory in which they reside." Act of February 8, 1887, sec. 6, 24 Stat. 388. Once all of the Indian households on a reservation had been "allotted," Congress frequently opened the remainder of the reservation to non-Indian settlement—ostensibly to expose Indians to civilizing influences and hasten their absorption into general American society. *See*, generally, Otis, *The Dawes Act and the Allotment of Indian Lands* (1973); Prucha (ed.), *Americanizing the American Indians* (1973). Until reversed by the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984), national policy contemplated the stepwise breakup and absorption of tribal territories—allotment, then settlement.

The issue in cases such as *Rosebud Sioux Tribe* and *DeCoteau, supra,* was whether the surplus land act opening an allotted reservation to settlement brought the settled area under State jurisdiction and control. There were at least three possible points for dating the demise of the reservation: when allottees' trust patents expired, when unallotted lands were opened to settlement, or when (and if) Congress formally declared the reservation terminated or abolished. This Court has particularized its treatment of these cases, using legislative history to choose different dating points in different situations. The fact remains, however, that the acts in question all reflected an assumption that State law would reach Indian

country, sooner or later—and that the private acquisition of title within reservations was ordinarily a major step in that direction.

After 1934, that assumption was no longer made by Congress, albeit a few individual reservations were completely (and very explicitly) "terminated" legislatively in the 1950s. *E.g.*, Act of August 13, 1954 (68 Stat. 724), 25 U. S. C. § 691; Act of August 13, 1954 (68 Stat. 718), 25 U. S. C. § 564; Act of June 17, 1954 (68 Stat. 250), 25 U. S. C. § 891. Since 1934, "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes [which] includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe, supra,* 103 S. Ct. at 2386-87. This includes favoring the tribe's "power to manage the use of its territory and resources by both members and non-members." 103 S. Ct. at 2387. Hence more recent legislation must be read against the "backdrop" of the contemporary policy favoring continued tribal self-government and territorial integrity.

Congress' avowed solicitude for the economic survival of the Lower Brule Sioux Tribe (*e.g.*, Senate Report 1636, *supra,* at 1, 3, 8) and larger policy of promoting tribal economic self-sufficiency indicate that the 1958 and 1962 takings should be construed strictly against unnecessary interference with economic or subsistence rights. *Bryan v. Itasca County, supra.* Indeed, both acts made specific provisions for mineral rights, grazing, timber, and wildlife within the area acquired for dam purposes by the United States. The takings were scarcely absolute

to begin with, and we are here merely considering whether one of the resource rights explicitly saved for the Tribe was implicitly transferred to State control of its exercise. If Congress did not see fit to take the Tribe's mineral, timber, grazing and wildlife rights when it could have easily done so, it would seem strange to imply the destruction of those same rights through the fiction of an unspoken delegation of regulatory powers.

CONCLUSION

The Lower Brule Sioux Tribe has suffered enough as a consequence of national watershed management on the Missouri River, losing all of its fertile riparian bottom lands to dam construction and reservoirs, and the relocation of its major town and half its population. It would be a manifest injustice to add to this the injury of State regulation and restriction of wildlife use in the project area—particularly when this must depend on implication and supposition rather than explicit statutory language or stated Congressional purposes. The Eighth Circuit was correct in concluding that neither the 1958 nor 1962 takings restricted tribal ownership and control of wildlife, and its order reversing and remanding the matter to the District Court should be left intact and the petition for certiorari be denied.

Respectfully submitted,

RUSSEL L. BARSH

SIDNEY C. FLORES
FLORES, ESTREMERA & BARRIOS
95 South Market Street, Suite 250
San Jose, California 95113
(408) 292-3400

Counsel for Respondent

APPENDIX A

Civil No. _____

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LOWER BRULE SIOUX TRIBE,

Plaintiff,

vs.

STATE OF SOUTH DAKOTA; JACK MERWIN, Secretary, Division of Game, Fish and Parks for the State of South Dakota,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Plaintiff, the Lower Brule Sioux Tribe of South Dakota, complains against the Defendants the following allegations.

PARTIES

1. The Lower Brule Sioux Tribe of South Dakota is a federally recognized Indian Tribe located within the exterior boundaries of the State of South Dakota.

2. The State of South Dakota is one of the several states of the United States.

3. Jack Merwin is the secretary and head of the agency of the State of South Dakota which is responsible for promulgating and enforcing the regulations and laws of the State with respect to game, wildlife and fish which are located within the State of South Dakota.

JURISDICTION

4. The Federal District Court for the District of South Dakota has jurisdiction over the causes of action alleged herein because the action is commenced by an Indian Tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws and treaties of the United States as required by 28 USC Sec. 1362.

VENUE

5. This action is properly brought in the Central Division because the Lower Brule Sioux Tribe and its reserved territory is located within the Central Division.

GENERAL ALLEGATIONS

6. There is now existing between the parties of this suit an actual, justiciable controversy in respect to which Plaintiff is entitled to have a declaration of its rights and other legal relations and further relief, including mandatory relief, because of facts, conditions and circumstances hereafter set forth.

7. During April, 1980, the Game, Fish, and Parks Commission adopted proposed Regulation No. 41:05:02:68. Regulation No. 41:05:02:68 established a Missouri River Refuge in portions of the Missouri River, including areas within that portion of the Big Bend Reservoir and Lake Sharpe which are within the boundaries of the Lower Brule Sioux Indian Reservation as established by the Act of March 2, 1889, and later diminished by the Act of March 3, 1899 (30 Stat. 1362) and the Act of April 21, 1906.

8. The Lower Brule Sioux Tribe has established a Missouri River Refuge which encompasses the area of the

Missouri River and Lake Sharpe from the northern most boundary of the Reservation on the River at the center of the Old Main Channel at approximately T 109 N, R 77 W, of the 5th Principal Meridian, there and thence southerly to the southern most boundary of the Reservation on the River at the center of the Old Main Channel at approximately T 105 N, R 71 W, of the 5th Principal Meridian, and such area as lies to the south and west of such center of the Old Main Channel of the Missouri River to the high water mark and submerged lands related thereto.

9. During April, 1980, the Game, Fish and Parks Commission adopted proposed Regulation No. 41:06:04:05 which prohibits the use of lead shot or other toxic shot within shotgun shells while hunting water fowl in the counties of Potter, Sully, Stanley and Lyman.

10. The Department of Game, Fish and Parks has imposed water fowl hunting season restrictions which purport to affect the area on the Missouri River and Lake Sharpe as described in Paragraph 7.

11. The Department of Game, Fish and Parks has extended the current state dark goose season within the area described in Paragraph 7 above.

12. On or about July 1, 1980, the Plaintiff through its tribal governing body met with the Defendant Merwin wherein the Defendant Merwin states an intention by the State Department of Game, Fish and Parks to enforce certain fishing laws and regulations as against all persons within the specific area of the Big Bend Dam which Merwin acknowledged was within the Lower Brule Sioux Indian Reservation. Merwin implied that such State laws and regulations would be applied to Lower Brule Sioux

tribal members in the vicinity of the Big Bend Dam within the Reservation's boundaries unless the Tribe enforced State laws or equivalent tribal laws against Indians in that area.

13. The State of South Dakota, through the regulations specifically identified herein and through additional laws and regulations as contained within the Administrative Rules of South Dakota at 41:01 et seq., has enacted laws and regulations which purport to affect water fowl hunting and fishing on the Missouri River and Lake Sharpe within the exterior boundaries of the Lower Brule Sioux Indian Reservation as described herein, both as to land adjacent to and waters thereof and both as to Indians and non-Indians within such territory. The state purports to apply such laws and regulations without regard for the territory and sovereignty of the Lower Brule Sioux Tribe in violation of the United States Constitution, laws and court decisions.

14. Such laws and regulations of the State of South Dakota propose to regulate the area as described in Paragraph 7 even though such areas are within the area reserved by the Lower Brule Sioux Tribe by the acts described in Paragraph 6 and thus are outside the jurisdiction and authority of the State of South Dakota.

15. The Lower Brule Sioux Tribe has duly enacted and enforced comprehensive hunting and fishing ordinances pursuant to its constitution, including Ordinance No. LB-75A entitled "Fish and Game Management" which Ordinance recognizes all wildlife within the Reservation as a resource. Such ordinance is applicable to all hunting, fishing and trapping within the external boundaries of the

Lower Brule Sioux Tribe as established by the acts described herein. Such Code provides that non-Indians who hunt, fish and trap on the Lower Brule Sioux Reservation shall comply with the laws of the State of South Dakota, the United States, and to the laws of the Lower Brule Sioux Tribe, whereas Indian persons shall comply with the laws of the Lower Brule Sioux Tribe and the United States. Such laws and regulations permit the assessment and collection of fees and licenses which provide revenue to the Tribe and provides a means to regulate the taking of game and fish so as to preserve and conserve the game and fish resources of the Tribe.

16. The Plaintiff maintains hunting reserves in the vicinity of the Missouri River from which the Plaintiff derives income. The success of such reserves is in part contingent upon the patronage of off-reservation non-members from whom the Tribe derives income through fees, licenses, and other revenues.

17. The Lower Brule Sioux Tribe has not sought to prohibit the use of lead shot or other toxic shot shells within its territory, while an individual is otherwise lawfully hunting water fowl.

18. The Lower Brule Sioux Tribe has independently established its own hunting season for dark geese.

19. The Lower Brule Sioux Tribe has heretofore enacted laws concerning general hunting, water fowl hunting and fishing seasons in the area described herein as being within the Lower Brule Sioux Indian Reservation which may or may not coincide within the fishing and hunting seasons of the State of South Dakota.

20. The Missouri River and Lake Sharpe, within the areas described herein on the Lower Brule Sioux Indian Reservation are inhabited by various species of fish, amphibians, reptiles and other wildlife not considered to be water fowl, in addition to water fowl.

21. Certain members and Indian residents of the Lower Brule Sioux Indian Reservation rely upon the lands and waters of the Missouri River and Lake Sharpe within the Reservation as described herein for portions of their livelihood and for portions of their food, clothing, ceremonial and recreational needs.

22. The Lower Brule Sioux Tribe looks to the collection of licenses and fees as a means of raising revenue necessary to regulate game and fish within the Reservation so as to preserve and conserve such game and fish for the purposes of the Reservation.

23. The Lower Brule Sioux Indian Reservation was reserved by the Congress and set aside for the purpose of providing members of the Lower Brule Sioux Tribe with a place to reside and for their absolute and undisturbed use and occupation. Such implicitly included the opportunity for such tribal members to make a living from the resources of the Reservation, including game, fish, and other wildlife for food, raiment, ceremonial needs, and as an income for members as individuals and as a collective group.

24. The Lower Brule Sioux Tribe, the Congress and the Executive branch of the United States Government have caused actions to be taken by various tribal and federal agencies to utilize, conserve, protect, preserve and enhance the natural resources of the Lower Brule Sioux

Tribe, including its wildlife resources, through the appropriation of monies and manpower.

25. As a result of the acts and omissions of the State of South Dakota with respect to the lands and waters herein described by applying regulations and laws promulgated by an agency and enforced by employees of the State of South Dakota for application within the boundaries of the Lower Brule Sioux Indian Reservation, the State of South Dakota has infringed upon the territory and the United States constitutional and congressionally mandated authority of the Lower Brule Sioux Tribe to govern itself, its members, its resources and all persons and wildlife within its external boundaries, free from the interference of the State of South Dakota.

26. Unless the State of South Dakota is temporarily, preliminarily and permanently restrained from applying its laws and regulations within the areas described herein, whether as to Indians, members of the Lower Brule Sioux Tribe, non-Indians, and non-Indian residents of the Lower Brule Sioux Indian Reservation, the State of South Dakota will continue to apply said laws in such a way as will infringe upon the territory and the sovereignty of the Lower Brule Sioux Tribe so as to interfere with the Tribe's right to self-government and the Tribe's rights as to its resources.

27. Failure to temporarily enjoin such actions pose a serious threat to the safety of persons who may come into contact with law enforcement officials of the State or Tribe so long as such persons are uncertain as to the jurisdiction of the State and Tribe within the Lower Brule Sioux Indian Reservation.

WHEREFORE, the Lower Brule Sioux Tribe is without a remedy at law with respect to the above allegations and is thus entitled to equitable relief from the acts and omissions of the Defendants.

FURTHERMORE, the Plaintiff will suffer immediate and irreparable harm unless the Defendants are temporarily, preliminarily and permanently restrained from continuing the above-referred-to acts and omissions.

FURTHERMORE, a declaratory judgment is appropriate to declare the rights of the parties with respect to the enforcement of State fish and game laws within the Lower Brule Sioux Indian Reservation as to Indians and non-Indians.

THEREFORE, the Plaintiff seeks a declaration from the Court pursuant to the Declaratory and Judgment Act at 28 USC Sec. 2201 and 2202 concerning the legal rights of the parties as to their respective authority to enforce their laws within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

FURTHERMORE, the Lower Brule Sioux Tribe seeks a declaration that the Defendants have no authority over hunting and fishing by any person within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

FURTHERMORE, the Plaintiff demands that a judgment and order be entered against the Defendants and in favor of the Plaintiff which provides that:

A. The Defendants, their agents, successors in interest and assigns be temporarily, preliminarily and permanently enjoined from in any way asserting and enforc-

ing laws and regulations of the State of South Dakota within the external boundaries of the Lower Brule Sioux Tribe as to any person, whether Indian or non-Indian, which are located therein.

B. The Defendants, their agents, successors in interest and assigns be temporarily, preliminarily and permanently enjoined from failing or refusing to adequately inform the members of the South Dakota general public that it does not possess authority to regulate persons who are hunting or fishing within the Reservation except as such laws are applied by Federal or Tribal laws.

C. The Plaintiff be granted such additional relief as the interest of equity and justice require.

DATED this 4 day of August, 1980.

/s/ William J. Srstka, Jr.
Attorney at Law
Duncan, Olinger, Srstka, Lovald
& Robbennolt, P.C.
117 East Capitol
Pierre, South Dakota 57501
Attorney for Plaintiff

/s/ R. Dennis Ickes of
Stringham, Larsen, Mazuran &
Sabin, A. P. C.
200 North Main, Suite 200
Salt Lake City, Utah 84103
Attorney for Plaintiff

APPENDIX B

CIV NO. 80-3046

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LOWER BRULE SIOUX TRIBE,

Plaintiff,

vs.

STATE OF SOUTH DAKOTA; JACK MERWIN, Secretary, Division of Game, Fish and Parks for the State of South Dakota,

Defendants.

ANSWER

The Defendants, State of South Dakota and Jack Merwin, Secretary of the State Department of Game, Fish and Parks answer Plaintiff's Complaint as follows:

I.

Admit paragraphs numbered 1, 2, 3, 4 and 5.

II.

Admit paragraph No. 6 to the extent that there is now existing between the parties an actual, justiciable controversy in respect to which the Plaintiff is entitled to have a declaration of its rights and other legal relations, vis-a-vis the Defendants.

III.

Admit paragraph No. 7 to the extent that during April, 1980, the Game, Fish and Parks Commission adopted proposed Regulation No. 41:05:02:68 and that said reg-

ulation established a Missouri River Refuge in portions of the Missouri River; but deny that the refuge lies within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

IV.

Defendants are without sufficient knowledge to admit or deny paragraph No. 8.

V.

Admit paragraph No. 9.

VI.

Admit paragraph No. 10, but deny that portion thereof which asserts that the area described is within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

VII.

Admit paragraph No. 11, but deny that portion thereof which asserts that the area described is within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

VIII.

Admit paragraph No. 12, but deny that portion thereof which asserts that Jack Merwin acknowledged that the "specific area of the Big Bend Dam . . . was within the Lower Brule Sioux Indian Reservation;" and deny that portion which asserts that Jack Merwin implied that the vicinity of the Big Bend Dam in question is within the reservation boundaries.

IX.

Admit paragraph No. 13, but deny that portion thereof which asserts that the Missouri River and Lake Sharpe and land adjacent thereto are within the exterior boundaries of the Lower Brule Sioux Indian Reservation, and further deny that "the State purports to apply such laws and regulations without regard for the territory of the Lower Brule Sioux Tribe in violation of the United States Constitution, laws and court decisions."

X.

Admit paragraph No. 14 to the extent that state laws and regulations apply to the areas in question, but deny that portion thereof which asserts that the area is within the Lower Brule Sioux Indian Reservation and thus outside of the jurisdiction and authority of the State of South Dakota.

XI.

Defendants are without sufficient knowledge to admit or deny paragraph No. 15.

XII.

Defendants are without sufficient knowledge to admit or deny paragraph No. 16.

XIII.

Defendants are without sufficient knowledge to admit or deny paragraph No. 17.

XIV.

Defendants are without sufficient knowledge to admit or deny paragraph No. 18.

XV.

Admit paragraph No. 19, but deny that portion thereof which asserts that the "area described" is within the exterior boundaries of the Lower Brule Sioux Reservation.

XVI.

Admit paragraph No. 20, but deny that portion thereof which asserts that the "area described" is within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

XVII.

Defendants are without sufficient knowledge to admit or deny paragraph No. 21.

XVIII.

Defendants are without sufficient knowledge to admit or deny paragraph No. 22.

XIX.

Defendants deny paragraph No. 23.

XX.

Defendants are without sufficient knowledge to admit or deny paragraph No. 24.

XXI.

Deny paragraph No. 25.

XXII.

Deny paragraph No. 26.

XXIII.

Deny paragraph No. 27.

AFFIRMATIVE DEFENSE

For their affirmative defense to the Lower Brule Sioux Indian Tribe's claim that certain portions of the Missouri River and Lake Sharpe and land adjacent thereto lie within the exterior boundaries of the Lower Brule Sioux Indian Reservation and are therefore subject to the exclusive jurisdiction of the Lower Brule Sioux Indian Tribe over hunting and fishing, the Defendants allege as follows:

I.

Even if this Court should find that the area in question lies in portion or in whole within the exterior boundaries of the Lower Brule Sioux Indian Reservation, the United States Congress, through the 1944 Flood Control Act (P. L. 534); Public Law 85-923, and Public Law 87-734 abrogated jurisdiction over hunting and fishing within the area in question which the Lower Brule Sioux Indian Tribe may have had, and granted to the State of South Dakota exclusive jurisdiction to regulate hunting and fishing by all persons in the area in question.

WHEREFORE, Defendants pray this Court to enter an Order and Judgment denying Plaintiff's prayer for relief and declaring that the State has exclusive jurisdiction to regulate hunting and fishing within the area described by the 1944 Flood Control Act, Public Law 85-923, and Public Law 87-734; and that the State has exclusive jurisdiction to regulate hunting and fishing by non-Indians and non-tribal Indians within the exterior boundaries of the

Lower Brule Sioux Indian Reservation with the exception that the State has exclusive jurisdiction to regulate all hunting and fishing by all persons on deeded land within the exterior boundaries of the Lower Brule Sioux Indian Reservation.

Dated this 26th day of August, 1980.

/s/ Robert L. Timm
Chief Deputy Attorney General
State Capitol
Pierre, South Dakota 57501
Telephone (605) 773-3215

/s/ Mikal Hanson
Assistant Attorney General

APPENDIX C

Civil No. _____

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF SOUTH DAKOTA
CENRAL DIVISION

LOWER BRULE SIOUX TRIBE,

Plaintiff,

vs.

STATE OF SOUTH DAKOTA; JACK MERWIN, Secretary, Game, Fish and Parks,

Defendants.

AFFIDAVIT OF MICHAEL JANDREAU IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

MICHAEL JANDREAU swears and affirms that:

1. I am a resident of the Lower Brule Sioux Indian Reservation within the external boundaries of the State of South Dakota and am in excess of 21 years of age.

2. I am the chairman of the governing body of the Lower Brule Sioux Tribe which body is called the Tribal Council.

3. The Lower Brule Sioux Tribe is a federally recognized Indian tribe organized pursuant to the Wheeler-Howard Act, 25 USC 461 et seq.

4. The Lower Brule Sioux Tribe is governed by a Tribal Council consisting of 7 persons.

5. The tribal constitution authorizes, among other things, the Tribal Council to levy license fees, to manage

tribal assets, to safeguard and promote the general welfare of the Tribe.

6. On or about July 6, 1977, the Tribal Council of the Lower Brule Sioux Tribe enacted Resolution No. 77-144 pursuant to a discussion that the Lake Sharpe-Missouri River portion of the Lower Brule Sioux Indian Reservation be closed as a refuge to waterfowl hunting. The Resolution was submitted to the Secretary of the Interior. Such Resolution is attached as Exhibit "A".

7. On or about June 4, 1980, the Tribal Council passed a correcting resolution which caused Resolution 77-144 to conform to the minutes of the council meeting wherein Resolution 77-144 was passed. Such correcting resolution acknowledged the establishment of a wildlife refuge for the entire area of Lake Sharpe-Missouri River within the exterior boundaries of the Lower Brule Sioux Indian Reservation. Such Resolution has been submitted to the Secretary of the Interior.

8. The Lower Brule Sioux Tribal Council, on or about September 4, 1974, adopted Ordinance No. LB-75-A "Fish and Game Management Code" of the Lower Brule Tribal Law and Order Code which requires all non-residents of the Reservation to conform to the laws of the United States, the State of South Dakota, and to the laws and regulations of the Lower Brule Sioux Tribe. Members of the Lower Brule Sioux Tribe are required to conform to the laws and regulations of the Lower Brule Sioux Tribe and the United States. Such ordinance has been submitted to the Secretary of the Interior. Such ordinance provides a means to levy and collect fees and licenses for the purpose of supporting regulation of game

and fish activity so as to preserve and conserve game and fish resources of the Tribe.

9. On or about July 1, 1980, a quorum of the Tribal Council and myself met with Jack Merwin, Secretary for the South Dakota Department of Game, Fish and Parks, pursuant to a request by Merwin. Merwin requested that the Tribal Council substantially conform its fishing laws and regulations to those promulgated by the State of South Dakota and his Department. Merwin further stated that the State is determined to enforce State laws and regulations pertaining to fishing in the immediate vicinity of the Big Bend Dam. I understood his comments to mean that unless the Tribe adopted laws and regulations substantially the same as the State's and then such laws as to Indians, then his office would enforce State laws against such Indians notwithstanding their status as Indians or members of the Lower Brule Sioux Tribe.

10. The Tribe maintains hunting reserves in the vicinity of the Missouri River from which the Tribe derives income. The success of such resources is in part contingent upon the patronage of non-members from whom the Tribe obtains revenue through fees and licenses and other revenue.

11. I know from personal experience that Indian persons on the Lower Brule Sioux Indian Reservation and on the Crow Creek Indian Reservation uniformly consider themselves subject to tribal and federal laws, but do not consider themselves subject to the laws of the State when within the exterior boundaries of their respective reservations.

12. I know that Big Bend Dam and areas downstream are located partially within the Lower Brule Sioux Indian Reservation and partially within the Crow Creek Indian Reservation.

13. I reasonably believe that any attempt by state law enforcement officials to enforce state laws as to Indians within the Lower Brule Sioux Indian Reservation may result in resistance by such Indians who currently reasonably believe that state law enforcement officials have no authority with respect to them within the Reservation. Such resistance may result in injury to Indians and law enforcement personnel.

14. I am aware that during April, 1980, the Game, Fish and Parks Commission adopted regulations affecting the Lower Brule Sioux Indian Reservation by: (1) designating as wildlife refuge area certain areas of Lake Sharpe and the Missouri River which lies between the center of the original main channel and the high water mark and submerged lands on the Lower Brule Sioux Indian Reservation side of the River; (2) prohibiting the use of lead shot or other toxic shot within shotgun shells while hunting water fowl within Stanley and Lyman Counties; and (3) extending the dark goose season. I am further aware that such regulations became effective on or about June 20, 1980.

15. I am aware that the Lower Brule Sioux Tribe has not prohibited the use of lead shot and that there may be other tribal laws and regulations which do not conform to existing and proposed state laws.

16. I am aware that members of the Lower Brule Sioux Tribe, non-member Indians, and other residents of

the Lower Brule Sioux Indian Reservation often rely upon hunting and fishing within the Reservation to provide their food and livelihood.

17. The fish, game, and other forms of wildlife on the Reservation are sources of food, ceremonial items, clothing, and recreation for tribal members. Non-members are permitted to hunt and fish within the Reservation, provided that they obtain appropriate licenses from the Tribe. Resident non-members who own or lease land within the Reservation are not required to obtain tribal licenses for hunting on lands under their ownership or lease but are required to have such licenses as to other lands within the Reservation.

18. I know that snagging and netting of game fish is not prohibited by the laws of the Lower Brule Sioux Tribe.

19. Since the early 1970s, the Tribe has generally not enforced tribal laws over non-members and the State has generally not enforced laws over tribal members. This policy is widely known by members of the Lower Brule Sioux Tribe. The Tribe has not conceded its authority over non-members within the exterior boundaries of the Reservation.

20. I believe that it is imperative to have a speedy injunction and trial before the waterfowl hunting season commences this fall so that potential confrontations based upon current perceptions may be avoided. It is equally important to have a speedy injunction and trial as to fishing, inasmuch as fishing is already in progress in the Big Bend disputed areas.

21. I believe that the Lower Brule Sioux Tribe will suffer immediate and irreparable harm if an injunction is not entered pending trial and other proceeding for the reason that: (a) Indian persons frequently fish in waters immediately below and adjacent to the Big Bend Dam which is prohibited by state law, but permitted by tribal law. Any attempt by state officials to enforce state laws against Indian persons may be resisted to some person's potential injury; (b) some Indian persons who fish for food in the area of the Big Bend Dam where the State has promised enforcement action will be deterred from doing so with the result that their normal supply will be threatened; (c) enforcement actions by state officials of state hunting and fishing laws on the Reservation will potentially create resistance as to enforcement by state officials as to other state laws.

DATED this 4th day of August, 1980.

/s/ Michael B. Jandreau

State of South Dakota, County of Hughes, ss.

On this 4th day of August, 1980, personally appeared before me MICHAEL JANDREAU, who duly acknowledged to me that he executed the foregoing Affidavit.

/s/ Mona Weiger
Notary Public
Residing in Hughes County
Pierre, S. D.

My commission expires: June 26, 1983

APPENDIX D

Civil No. _____

IN THE UNITED STATES DISTRICT COURT
AND FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LOWER BRULE SIOUX TRIBE,

Plaintiff,

vs.

STATE OF SOUTH DAKOTA; JACK MERWIN, Secretary, Game, Fish and Parks,

Defendants.

AFFIDAVIT OF DUANE GOODFACE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DUANE GOODFACE deposes and swears that:

1. I am a resident of the Lower Brule Sioux Indian Reservation and am an enrolled member of the Lower Brule Sioux Tribe and am in excess of 21 years of age.

2. I am an employee of the Lower Brule Sioux Tribe and am employed as the Director of the Department of Outdoor Recreation. I have served as Director since 1976.

3. As the Director I am responsible for administering the fish and game management laws, including the Fish and Game Management Code known as LB-75-A. Specifically, my duties include doing studies of wildlife habitat, planting vegetation to improve wildlife habitat, stocking of various reservoirs with fish, conducting game counts, supervising other wardens and conservation aides, and other related duties.

4. The Lower Brule Sioux Tribe employs three conservation aides and game wardens whose duty it is to patrol the territory within the Reservation to enforce Lower Brule Sioux fishing and hunting laws as to all Tribal members, all non-residents, all non-member residents who are hunting or fishing on lands other than lands owned or controlled by them. However, as a result of an informal acquiescence with the State of South Dakota Division of Fish and Parks, Tribal law enforcement officers have not since 1977 applied Tribal hunting and fishing laws as to non-members of the Lower Brule Sioux Tribe. Also, the State of South Dakota has not to my knowledge applied state law to Tribal members. I am aware of said policy by virtue of my residence within the Lower Brule Sioux Indian Reservation.

5. As the Director of the Department of Outdoor Recreation, I am directly answerable to the Tribal Council and report to the Chairman of said Council.

6. My experience is that the members of the Lower Brule Sioux Tribe are generally aware of the policy referred to in Paragraph 4. As a result, Indian persons on the Reservation generally consider themselves subject to tribal and federal laws, but do not consider themselves subject to state laws when within the exterior boundaries of the Reservation.

7. I know the Big Bend Dam and certain areas down stream are partially located within the Lower Brule Sioux Indian Reservation and partially within the Crow Creek Indian Reservation.

8. I reasonably believe that any attempt by state law enforcement officials to enforce state laws as to Indians within the Lower Brule Sioux Indian Reservation may result in resistance by such Indians who currently reasonably believe that state law enforcement officials have no authority with respect to them within the Reservation. Such resistance may result in injury to Indians and law enforcement personnel.

9. I am aware that during April, 1980, the Game, Fish and Parks Commission adopted regulations affecting the Lower Brule Sioux Indian Reservation by: (1) designating as wildlife refuge area certain areas of Lake Sharpe and the Missouri River which lie between the center of the original main channel and the high water mark and submerged lands on the Lower Brule Sioux Indian Reservation side of the River; (2) prohibiting the use of lead shot or other toxic shot within shotgun shells while hunting water fowl within Stanley and Lyman Counties; and (3) extending the dark goose season. I am further aware that such regulations became effective on or about June 20, 1980.

10. I am aware that the Lower Brule Sioux Tribe has not prohibited the use of lead shot and that there may be other tribal laws and regulations which do not conform to existing and proposed state laws.

11. I am aware that members of the Lower Brule Sioux Tribe, non-member Indians, and other residents of the Lower Brule Sioux Indian Reservation often rely upon hunting and fishing within the Reservation to provide their food and livelihood.

12. The fish, game, and other forms of wildlife on the Reservation are sources of food, ceremonial items, clothing, and recreation for tribal members. Non-members are permitted to hunt and fish within the Reservation, provided that they obtain appropriate licenses from the Tribe. Resident non-members who own or lease land within the Reservation are not required to obtain tribal licenses for hunting on lands under their ownership or lease but are required to have such licenses as to other lands within the Reservation.

13. I know that snagging and netting of game fish is not prohibited by the laws of the Lower Brule Sioux Tribe.

14. I believe that it is imperative to have a speedy injunction and trial before the waterfowl hunting season commences this fall so that potential confrontations based upon current perceptions may be avoided. It is equally important to have a speedy injunction and trial as to fishing rights inasmuch as fishing is already in progress in the Big Bend disputed area.

15. I believe that the Lower Brule Sioux Tribe will suffer immediate and irreparable harm if an injunction is not entered pending trial and other proceeding for the reason that: (a) Indian persons frequently fish in waters immediately below and adjacent to the Big Bend Dam which is prohibited by state law, but permitted by tribal law. Any attempt by state officials to enforce state laws against Indian persons may be resisted to some person's potential injury; (b) some Indian persons who fish for food in the area of the Big Bend Dam where the State has promised enforcement action will be deterred from doing so with the result that their normal supply will be threat-

ened; (c) enforcement actions by state officials of state hunting and fishing laws on the Reservation will potentially create resistance as to enforcement by state officials as to other state laws.

DATED this — day of —, 1980.

Duane Goodface

* * *

State of ....., *County of* ....., *ss.*

On this —— day of ————, 1980, personally appeared before me DUANE GOODFACE, who duly asknowledged to me that he executed the foregoing Affidavit.

NOTARY PUBLIC

Residing in ———— County

My commission expires:

————.